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No. 97-1191

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In The

Supreme Court of the United States

October Term, 1997

WAL-MART STORES, INC.,

Petitioner,

vs.

CLYDE N. GRIFFITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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Wal-Mart Stores, Inc. ("Wal-Mart"), has previously filed a Petition requesting that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. Respondent has filed a Brief in Opposition and this Reply brief is filed, pursuant to Supreme Court Rule 15(6), to respond to the new points raised by Respondent and cite new decisions rendered since the Petition was filed.

FURTHER REASONS FOR GRANTING THE WRIT

I.

MR. GRIFFITH SHOULD BE BOUND BY HIS SWORN STATEMENTS.

Respondent makes much of the alleged "admission" by Wal-Mart that Mr. Griffith could perform the essential functions of his job at Wal-Mart. This is a mischaracterization of the evidence and ignores Mr. Griffith's own sworn statements to the contrary. Mr. Griffith's ability to do the job while working at Wal-Mart was never an issue in this action. Wal-Mart accommodated all disabilities reported by Mr. Griffith. However, by virtue of his own sworn statements in filings with the Social Security Administration ("SSA"), Mr. Griffith created this issue. By those statements, Mr. Griffith clearly admitted facts that establish he was not "otherwise qualified" and therefore, not entitled to the protection of the Americans With Disabilities Act ("ADA").

Wal-Mart has truthfully admitted throughout this litigation that **while he was an employee**, Mr. Griffith was capable of performing the essential functions of his job. But Mr. Griffith told the SSA that he is no longer able to perform the essential functions of the job. This is precisely the point. If what Mr.

Griffith said in his various filings with the SSA is true, as he swore it to be true, as a matter of law he cannot perform the essential functions of the job at Wal-Mart and no reasonable jury could so find.

The Respondent's Brief in Opposition simply ignores Mr. Griffith's sworn statements:

> Question: Have you ever done any work outside your home? *If no*, what has kept you from doing the public work? *If yes*, where and when did you last work, for how long, and why did you stop working?
>
> Answer: No! **With my back injury, I can only stand for about 10 minutes at a time.** My back is getting worse.

SSA "Activities of Daily Living" questionnaire (August 1993).

> Question: Describe any physical or mental limitations you have as a result of your condition since you filed your claim.
>
> Answer: **No lifting, standing, walking or sitting for more than 10 [minutes] at a time.**
>
> Question: Describe any physical or mental limitations you have as a result of your condition since you filed your claim.
>
> Answer: **No lifting, standing, walking or sitting for more than 10 [minutes] at a time.**

SSA "Reconsideration Disability Report" (August 1993).

These sworn statements are inconsistent with what Wal-Mart observed concerning Mr. Griffith's abilities at the time he was working at Wal-Mart. However, if they are true, as Mr. Griffith has sworn, they are clearly incompatible with Wal-Mart's job requirements. No job could be devised or amended by Wal-Mart to accommodate Mr. Griffith. Mr. Griffith should not be allowed the opportunity to argue and attempt to prove to a jury that his own sworn statements to the SSA are false.

II.

THERE IS A GENUINE SPLIT AMONG THE CIRCUIT COURTS OF APPEALS.

Respondent argues that the split among the Circuit Courts of Appeals outlined in Petitioner's Brief is "more form than substance." (Brief in Opposition pp. 7-13.) Respondent claims that the Circuit Courts of Appeals "uniformly make their decisions based upon the claimant's assertions in light of all of the available evidence." (Brief in Opposition p. 7.) This argument is simply wrong. The courts that apply the theory of judicial estoppel do not engage in a review of all the evidence and then evaluate whether the claimant has sufficient evidence to proceed to a jury trial. *McNemar v. The Disney Stores, Inc.*, 91 F.3d 610 (3rd Cir. 1996), *cert. denied*, __ U.S. __, 1175 S. Ct. 958, 136 L. Ed. 2d 845 (1997). To the contrary, strict application of judicial estoppel means the court simply looks at whether the claimant made representations or statements to the SSA that he or she was totally disabled and unable to work. If the claimant has made such assertions, the court looks no further; judicial estoppel applies to preclude evaluation of any additional facts. *Id. See also, August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992).

A new decision from the Fourth Circuit also adopts the theory of judicial estoppel in a case involving a claimant who

asserted disability to the SSA, but claimed to have been able to work for purposes of her ADA case. *Cathcart v. Flagstar Corp.*, No. 97-1977, 1998 WL 390834 (4th Cir. June 29, 1998). The Fourth Circuit opinion discusses and accepts the use of judicial estoppel in this type of case, but found that the prerequisites for the application of judicial estoppel were not met concerning this particular claimant.

Even those Circuit Courts of Appeals that do not strictly apply judicial estoppel do not simply "weigh the evidence". Instead, these courts hold that the claimant is bound by the sworn statements made to the SSA and is not permitted, in the context of an ADA case, to try and prove those statements were false. *See, e.g., Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210 (8th Cir. 1998); *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3435 (U.S. Dec. 15, 1997) (No. 97-1008) ("It is at least theoretically conceivable that under some limited and highly unusual set of circumstances, the two claims would not necessarily be mutually exclusive.)

Application of judicial estoppel to the facts of this case would result in a holding that Mr. Griffith, having sworn to the SSA that he could not lift, stand, sit or walk for more than ten minutes would be bound by that statement. Applying judicial estoppel would preclude Mr. Griffith from trying to prove to a jury that, despite his statements to the SSA, he could in fact successfully work at Wal-Mart.

This approach is to be contrasted with the approach adopted by the Sixth Circuit in this case. In this case, the Sixth Circuit did simply weigh the evidence and determine that the claimant should be allowed to proceed to a jury trial despite the statements he made in an effort to obtain disability benefits from the SSA. Circuit Courts of Appeals that follow this approach include the

Sixth, Seventh, Eleventh and District of Columbia Circuits. *Griffith v. Wal-Mart*, 135 F.3d 376 (6th Cir. 1998); *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997); *Weigel v. Target Stores, Inc.*, 122 F.3d 461 (7th Cir. 1997); *Swanks v. Washington Metro. Area Transit Auth.*, 116 F.3d 582 (D.C. Cir. 1997).

A final approach, apparently adopted only by the Tenth Circuit, is to refuse to accept the theory of judicial estoppel under any circumstances. *Rascon v. U.S. West Communications*, 143 F.3d 1324 (10th Cir. 1998).

There is genuine conflict among the various Circuit Courts of Appeals concerning whether and how to apply the theory of judicial estoppel in the context of a claimant who has sought or obtained disability benefits and who also seeks relief under the ADA. This Court should grant the Petition to resolve this conflict.

III.

HOW TO CORRECTLY INTERPRET AND APPLY THE ADA WHEN A DISABLED CLAIMANT IS ALSO RECEIVING DISABILITY BENEFITS IS AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

As discussed in the Petition, the question of how the courts should treat claimants who have sought and received disability benefits from the SSA and now seek to file claims under the ADA must be resolved. This issue presents an important question of federal law concerning two significant statutes. The issue is of utmost concern and gravity to the millions of Americans who apply for benefits from the SSA.

The Brief in Opposition filed by Respondent is silent on this point. Petitioner, accordingly, will not reiterate the arguments made in the Petition in this regard. Respondent's Brief in Opposition focuses solely on the merits of his particular case. This Court has the responsibility to look further and intervene when broad questions of public policy and the interpretation of important federal statutes are implicated. *See, e.g., Pinter v. Dahl*, 486 U.S. 622, 100 L. Ed. 2d 658, 108 S. Ct. 2063 (1988); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 286 L. Ed. 2d 286, 108 S. Ct. 364 (1987). This case presents such issues; this Court should grant the Petition to resolve them.

IV.

THERE IS CONTINUING CONFUSION AMONG THE CIRCUITS AS TO THE PROPER APPLICATION OF THIS COURT'S SUMMARY JUDGMENT STANDARDS.

Even if this Court concludes that the various Circuit Courts of Appeals are in fact all simply applying their own version of the summary judgment standards enunciated by this Court, the Court should still grant review of this judgment. The decision by the Sixth Circuit in this case, as well as decisions by the other Circuit Courts of Appeal, conflict with the decisions of this Court concerning the proper standards for the grant of summary judgment and demonstrate continuing confusion among the Circuits Courts of Appeals as to the proper application of this Court's summary judgment standards. This argument was set out fully in the Petition and will not be repeated here. It is significant that the Brief in Opposition did not even address this question. This Court is faced with the need to consider the global implications of *Griffith v. Wal-Mart*, 135 F.3d 376 (6th Cir. 1998). The Sixth Circuit's opinion in this case should be considered in order to reestablish the appropriate

parameters which should be used by the Circuit Courts of Appeals in granting or denying summary judgments.

In a very recent decision, the Eighth Circuit has properly applied this Court's directives on when summary judgment may appropriately be granted. *Downs v. Hawkeye Health Services, Inc.*, __ F.3d __, No. 97-3851, 1998 WL 348201 (8th Cir. July 1, 1998). In *Downs*, as in the present case, the claimant made specific statements to the SSA in his various filings with them concerning his physical inability to perform work. The Eighth Circuit refused to adopt a strict application of judicial estoppel, but noted:

> A plaintiff may not take inconsistent positions in such proceedings with impunity. An ADA plaintiff may not suddenly step forward to deny the truth of ongoing representations he has made pursuant to an application for disability benefits.

Id. at 2.

Given Mr. Downs's statements to the SSA, the *Downs* Court affirmed the summary judgment entered for his employer. Significantly, the *Downs* Court rejected the precise arguments made by Mr. Griffith here including Mr. Griffith's claim that he would have been able to continue to perform essential job duties "but for the fact that his termination itself so devastated him that his disability worsened." *Id.* at 3. The Eighth Circuit rejected this argument: "The argument is resourceful, but we are unpersuaded. First, it flatly contradicts the information he provided to the Social Security Administration." *Id.*

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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